Fordham Law Review

Volume 28 | Issue 2 Article 6

1959

Municipal Liability for Failure to Provide Police Protection

COMMENTS

MUNICIPAL LIABILITY FOR FAILURE TO PROVIDE POLICE PROTECTION

On March 8, 1952, Arnold Schuster was shot and killed in the street near his home in New York City.[1] Three weeks before, Schuster had given the New York City Police Department information leading to the arrest of Willie Sutton, a criminal of national repute and an escaped convict. Schuster's role was widely publicized and, as a result, he began receiving threatening communications, about which he notified the New York City police. It was alleged in the complaint in the ensuing action, brought by his father, that the police provided only limited protection, and then withdrew even that, despite knowledge of the continuing threats; that the police assured Schuster that the threats were merely the work of "cranks," and that he was in no danger. The suit, grounded in negligence, was against the City of New York.

The supreme court dismissed the complaint,[2] holding that there was no liability on the part of the city for failure to furnish police protection to an individual. This freedom from liability was predicated upon the state's sovereign immunity from liability for negligence in the performance of governmental functions. The appellate division, in a per curiam decision,[3] affirmed special term. The court of appeals framed the issue as "whether a municipality is under any duty to exercise reasonable care for the protection of a person in Schuster's situation."[4] It found that the city "owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration."[5]

The purpose of this comment is to study the effect of *Schuster v. City of New York*[6] on the law relating to municipal duty to individuals in the area of police functions. Intertwined with the problem of whether there is any duty of care owing to an individual by a municipality in such a situation is the problem of whether the state, and through it, the municipality, is still cloaked with any vestige of immunity.

Sovereign Immunity Historically

At common law the sovereign had complete immunity. This seems to have been derived from the idea that, there being no court with jurisdiction over the king, he was not suable.[7] The history of immunity in America was reviewed by the

1. N.Y. Times, March 9, 1953, p. 1, col. 8.

2. Schuster v. City of New York, 207 Misc. 1102, 121 N.Y.S.2d 735 (Sup. Ct. 1953).

3. Schuster v. City of New York, 286 App. Div. 389, 143 N.Y.S.2d 778 (2d Dep't 1955).

4. Schuster v. City of New York, 5 N.Y.2d 75, 80, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 269 (1958).

5. Id. at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.

6. 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

7. For a general discussion of the origin of sovereign immunity in England and its transfer to America, see 2 Harper & James, Torts, §§ 29.2, .3 (1956). See also Borchard,

United States Supreme Court in *Feres v. United States*,[8] wherein, speaking for the Court, Mr. Justice Jackson noted that "while the political theory that the king could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown."[9] Mr. Justice Holmes attempted to find a rationale for this apparently anachronistic rule of immunity, namely, that there could be no legal right as against the authority that makes the law on which the right depends.[10]

The Supreme Court itself very early in its history tempered the doctrine of sovereign immunity by allowing a suit in a federal court against the State of Georgia by a citizen of another state.[11] The clamor that followed this decision led to the eleventh amendment which expressly forbids suit against a state by a citizen of another state,[12] and, by judicial decision, immunity has been extended to suits by a citizen of the defendant state.[13] Thus, there is a quasi-constitutional authority for state immunity.

POLITICAL SUBDIVISIONS—GOVERNMENTAL AND PROPRIETARY FUNCTIONS

Political subdivisions of a state, not being sovereignties, have no immunity of their own, but they share the immunity of the parent state. The immunity of the subdivision (municipality) at common law was not complete, but applied only when it was acting as an agent of the state.[14] To determine when it was so acting, case law developed the distinction between *governmental* functions, where immunity was enjoyed, and *proprietary* functions, where liability sometimes existed.

Generally, a governmental function has the element of duty in it, and is a power granted for public purposes exclusively.[15] A proprietary or corporate function is one which the municipality undertakes of its own discretion, and looks not merely toward the benefit of the public, but also, or perhaps solely, to some benefit to be derived by the municipal corporation itself.[16] The fact

Government Liability in Tort, 34 Yale L.J. 1 (1924); Borchard, Government Responsibility in Tort (pts. IV-VI), 36 Yale L.J. 1, 757, 1039 (1926-27); Borchard, Government Responsibility in Tort (pts. VII, VIII), 28 Colum. L. Rev. 577, 734 (1928).

8. 340 U.S. 135 (1950), citing: Ickes v. Fox, 300 U.S. 82 (1937); Reeside v. Walker, 52 U.S. (11 How.) 271 (1850); United States v. McLemore, 45 U.S. (4 How.) 286 (1846).

9. 340 U.S. at 139.

10. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

11. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

12. U.S. Const. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

13. Ex parte State of New York, 256 U.S. 490 (1921).

14. Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945). See Prosser, Torts § 109, at 774 (2d ed. 1955).

15. Bailey v. The Mayor, 15 N.Y. (3 Hill) 531 (1842); 43 C.J. Municipal Corporations § 1704 (1927).

16. See note 15 supra.

that the benefit inures ultimately to the public does not render the function a governmental one.[17] In practice it is often difficult to determine whether a function is governmental or proprietary,[18] but there is no doubt that police activity is governmental.[19] New York City's Charter imposes upon it the duty of maintaining a police department;[20] thus, when it exercises its police power, it is exercising a governmental function. It is acting as an arm of the state, and thereby enjoys the privileges of the state in the matter.[21]

WAIVER OF IMMUNITY—ACTS OF COMMISSION AND OMISSION

When the sovereign was immune a remedy was frequently found for its wrong by means of a private act of Congress.[22] This was cumbersome, however, and hardly the best means of assuring equal justice. Thus, it became common for sovereign entities to waive their immunity.[23] New York accomplished this waiver, in 1929, in the Court of Claims Act which provides: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions . . . against individuals or corporations . . . ."[24] Although the waiver seems clearly all-inclusive, courts have been reluctant to find that it extends to *all* activities of the state government, and have clung to the old distinction between governmental and corporate functions, holding in one case[25] that the waiver was only as to wrongs committed by the state in its nongovernmental capacity, so that there still was to be no liability for wrongs committed in a governmental capacity. In that area, immunity still existed and municipal corporations were still to enjoy the extension of this immunity to them. The outlook of that court so holding was probably based on the doctrine that statutes in derogation of the sovereignty of a state should be strictly construed, and the waiver of immunity from liability must be clearly expressed.[26] Other cases,[27] since 1929, have not been quite so adamant, however, in refusing to recognize that the legislature did intend its waiver to have some meaning; this group has found the waiver effective as to governmental acts of *commissive* negligence, but not *omissive* negligence.

Thus, the appellate division in 1946, in *Murrain v. Wilson Line*,[28] felt safe in saying: "The law is established that a municipality is answerable for the

17. Missano v. The Mayor, 160 N.Y. 123, 54 N.E. 744 (1899).

18. See 2 Harper & James, Torts § 29.6, at 1621 (1956).

19. 18 McQuillin, The Law of Municipal Corporations § 53.51 (3d ed. 1950).

20. N.Y.C. Charter ch. 18, § 431.

21. 18 McQuillin, op. cit. supra, note 19, at § 53.51.

22. Feres v. United States, 340 U.S. 135 (1950).

23. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1346 (1952).

24. N.Y. Ct. Cl. Act § 8.

25. Ferrier v. City of White Plains, 262 App. Div. 94, 28 N.Y.S.2d 218 (2d Dep't 1941).

26. Goldstein v. State, 281 N.Y. 396, 24 N.E.2d 97 (1939); Smith v. State, 227 N.Y. 405, 125 N.E. 841 (1920).

27. See notes 28, 29, & 30 infra.

28. 270 App. Div. 372, 59 N.Y.S.2d 750 (1st Dep't 1946).

negligence of its agents in exercising a proprietary function, and at least for their negligence of commission in exercising a governmental function . . . but a municipality is not liable for its failure to exercise a governmental function, such as to provide police or fire protection."[29] The fourth department implied, in 1956, that it adhered to the view expressed in *Murrain* when it upheld a negligence complaint in *Benway v. City of Watertown*,[30] and observed in justifying its holding that the affirmative act alleged was not an omission to exercise a governmental function.[31] The second department, as late as 1951, also held that there is no liability for failure to perform a governmental function in *Landby v. New York, N.H. & H.R.R.*,[32] but reversed itself, in 1953, in *Runkel v. City of New York*,[33] declaring: "The surrender of the sovereign immunity from liability with respect to a governmental function, is not limited to any acts of misfeasance or nonfeasance—commission or omission. The surrender is broad, general and unqualified."[34] The third department broke away from the "commission-omission" distinction as early as 1936 in *Slavin v. State*.[35]

There have been several court of appeals decisions, since 1929, upholding the validity of complaints in which the negligence alleged was largely of the omissive variety. In 1945, the court found the state could incur liability to the plaintiff injured in an accident that occurred as a result of a burned out traffic bulb that the State Traffic Commission had failed to replace.[36] In 1947, the court upheld a complaint alleging negligence by the city in failing to discharge a policeman with a bad record of intoxication, who subsequently shot the plaintiff.[37] Two cases[38] allowed suit where police took into custody an intoxicated individual who asked for a doctor, and the police delayed in procuring medical services. In 1956, the court of appeals affirmed an appellate division decision[39] upholding a complaint which alleged failure by the city to properly train, in rapid-fire pistol shooting, a policeman who fired five shots at a holdup man and put four of them into the holdup victim. Finally, in 1958, liability was held to be shown in a complaint which alleged that three policemen failed to arrest a fourth whom they knew was intoxicated and a source of potential danger.[40] The cumulative effect of these cases would seem reasonably

29. Id. at 375, 59 N.Y.S.2d at 753.

30. 1 App. Div. 2d 465, 151 N.Y.S.2d 485 (4th Dep't 1956).

31. Id. at 467, 151 N.Y.S.2d at 487.

32. 278 App. Div. 965, 105 N.Y.S.2d 839 (2d Dep't 1951).

33. 282 App. Div. 173, 123 N.Y.S.2d 485 (2d Dep't 1953). See also Meistinsky v. City of New York, 285 App. Div. 1153, 140 N.Y.S.2d 212 (2d Dep't 1955), aff'd mem., 309 N.Y. 998, 132 N.E.2d 900 (1956).

34. 282 App. Div. at 178, 123 N.Y.S.2d at 490-91.

35. 249 App. Div. 72, 291 N.Y.S. 721 (3d Dep't 1936).

36. Foley v. State, 294 N.Y. 275, 62 N.E.2d 69 (1945).

37. McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947).

38. O'Grady v. City of Fulton, 4 N.Y.2d 717, 148 N.E.2d 317 (1958); Dunham v. Village of Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1952).

39. Meistinsky v. City of New York, 285 App. Div. 1153, 140 N.Y.S.2d 212 (2d Dep't 1955), aff'd mem., 309 N.Y. 998, 132 N.E.2d 900 (1956).

40. Lubelfeld v. City of New York, 4 N.Y.2d 455, 151 N.E.2d 862, 176 N.Y.S.2d 302 (1958).

to indicate that New York had swept away the last vestige of sovereign immunity. Yet, the supreme court, in dismissing the action in the *Schuster* case, preferred to follow *Murrain v. Wilson Line*,[41] rather than the several cases that followed it, and the appellate division agreed. The reversal by the court of appeals should clear the air of the uncertainty that existed as to the extent of New York's waiver of its immunity from suit, since it contains an express statement of the extent of the waiver of immunity, while previous cases had only implied it, and had left room for the appellate division to find no total waiver in the *Murrain, Benway* and *Landby* cases.

The Municipality's Duty to the Individual

Once the way has been cleared for a plaintiff to sue on nonfeasance in a governmental function, his right is then "determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations . . . ."[42] As pointed out in the *Runkel* case, "here as in any other case, and whether the duty involved be governmental or otherwise, it is always a fundamental prerequisite to liability that the duty be found to have been enjoined or undertaken for the protection or benefit of the injured person who is seeking to recover."[43]

This question of whether there is a duty owed to an individual could not be reached until it was determined that the area was one in which liability could exist. Some courts tend to blend the two, finding no duty *because* there is an applicable immunity.[44] But there is a real difference; the waiver allows the possibility of liability; the fact of liability is determined by the ordinary rules of negligence. The question of whether the police have any obligation that could give rise to an action by an individual is, of course, only as old as the waiver of immunity. The problem, probably because of its newness, has given the courts considerable trouble.

Courts usually approach the problem by going to the source of the duty imposed on the police or any other arm of government to determine how far that duty extends. The source, of course, is a statute. The test then is whether the intent of the statutory enactment is to protect an individual against an invasion of a property or personal interest.[45] The applicable statutory enactment involved in the *Schuster* case was chapter 18, section 435 of the New York City Charter which provides: "The police department and force shall have the power and it shall be their duty to preserve the public peace, prevent crime, detect and arrest offenders . . . protect the rights of persons and property . . . ."

The municipal corporation, through its agent, the police, has been held liable in many situations not *directly* involving statutory duties. Thus, liability

41. See note 28 supra and accompanying text.

42. N.Y. Ct. Cl. Act § 8.

43. 282 App. Div. at 178-79, 123 N.Y.S.2d at 491.

44. See, e.g., Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S.2d 750 (1st Dep't 1946).

45. Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945).

was found to exist in two similar cases where the police took in an apparently intoxicated old man to give him a warm place to sleep, and failed to provide medical care upon discovering he was injured and sick.[46] Other cases found negligence on the part of the police department in retaining a policeman whom it knew was inadequately trained,[47] in failing to take into custody an intoxicated policeman who then shot a cab driver,[48] in failing to discharge a policeman who had a record of three intoxications,[49] and in failing to rescind an erroneous "wanted" bulletin.[50] All of the above cases, except the last, were cited by the court of appeals in the *Schuster* case, but they indicate, only in a general way, an obligation on the part of the police for the breach of which the police (or rather the municipality) incurs liability to individual members of the community endangered by such breach. Indeed, there seem to be no cases squarely on the point of whether police protection is owed to individuals except for the case of *Murrain v. Wilson Line*,[51] where the finding of an absence of duty to individuals was weakened by the court's failure to distinguish the separate problems of duty and immunity.

Analogous to the situation of the police department, however, are those of the fire and water departments. The foremost case in that area is *Moch Co. v. Rensselaer Water Co.*,[52] where the defendant contracted to supply water to fire hydrants, and thus occupied the position of a water company. Plaintiff's building burned down when defendant failed to furnish sufficient water pressure at the hydrants after notice of the fire. The court of appeals held that the water company undertook no obligation to individual property owners who might have need of the water at the hydrants; it stressed that the negligence was of omission and found that the crucial point.[53] Actually, as Prosser points out,[54] the court appeared reluctant to impose what it foresaw as the potentially overwhelming burden that a contrary holding might entail. *Steitz v. City of Beacon*,[55] which followed the *Moch* case, was express on its fears along that line. Such a ground for the decisions seems sustainable on the theory that duty in every instance must be measured by what is reasonable, and an obligation will not be imposed that is unreasonable in its scope.[56] The supreme court, in the *Schuster* case, sought to apply this rationale when it said: "The right of the public generally to be safeguarded against burglaries does not give a cause of action to the individual whose home has been burglarized."[57] The court of

46. See note 38 supra.
47. Meistinsky v. City of New York, 285 App. Div. 1153, 140 N.Y.S.2d 212 (2d Dep't 1955), aff'd mem., 309 N.Y. 998, 132 N.E.2d 900 (1956).
48. Lubelfeld v. City of New York, 4 N.Y.2d 455, 151 N.E.2d 862, 176 N.Y.S.2d 302 (1958).
49. McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947).
50. Slavin v. State, 249 App. Div. 72, 291 N.Y.S. 721 (3d Dep't 1936).
51. See note 44 supra.
52. 247 N.Y. 160, 159 N.E. 896 (1928).
53. Id. at 169, 159 N.E. at 899.
54. Prosser, Torts, § 90, at 516 (2d ed. 1955).
55. 295 N.Y. 51, 64 N.E.2d 704 (1945).
56. Prosser, Torts, § 36 (2d ed. 1955).
57. 207 Misc. at 1107, 121 N.Y.S.2d at 741.